No. A-590

77-1237

Supreme Court, U. S.
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IN THE SUPREME COURT

OF THE UNITED STATES

In The Matter of Lewis T. Wireman

PETITION FOR

WRIT OF CERTIORARI

To the Supreme Court of Indiana

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March 10, 1978

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No. A-590

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1977
IN RE WIREMAN
PETITION FOR A WRIT OF
CERTIORARI TO THE
SUPREME COURT OF INDIANA

TO THE HONORABLE, THE CHIEF JUSTICE and ASSOCIATE JUSTICES of the SUPREME COURT OF THE UNITED STATES

Lewis T. Wireman, the petitioner herein prays that a writ of certiorari issue to review the judgment of the Supreme Court of Indiana entered in the above entitled case on October 14, 1977.

OPINION BELOW

The opinion of the Supreme Court of Indiana is reported at 367 NE 2nd 1368 and is printed in Appendix A hereto infra page 44. The judgment of the Supreme Court of Indiana is printed in Appendix A hereto infra page 44.

JURISDICTION

The judgment of the Supreme Court of Indiana was rendered on October 14, 1977. Petitioner filed a motion to correct Error on December 16, 1977. Because the Disciplinary Rules of the Supreme Court of Indiana were unclear as to whether or not a Motion to Correct Errors was available to Petitioner to request reconsideration by the Supreme Court of Indiana of its decision on October 14, 1977, Petitioner

submitted an Application for Extension of Time to File Petition for Certiorari. This court granted said extension of time by an order of Justice Stevens. Said extension of time was granted for the period through March 13, 1978. (The order is printed in Appendix A hereto infra page 43). On February 22, 1978 the Supreme Court of Indiana ruled that a Motion to Correct Errors is not appropriate under the Disciplinary Rules of the Supreme Court of Indiana. (The order is printed in Appendix A infra at page 42.)

The jurisdiction of the Court is involked under the provisions of 28 U.S.C. § 1257 (3).

QUESTIONS

Petitioner respectfully submits that the following questions concerning deprivation of his rights and privileges under the United States Constitution are presented:

(1) Was Petitioner denied his right to a fair and impartial hearing under the Fifth and Fourteenth Amendments of the United States Court Action by the rulings of the Hearing Officer concerning:

(a) the admissibility of hearsay testimony proffered by the Disciplinary Commission and by the Petitioner.
(b) The admissibility of testimony of witnesses who had given previous grand jury testimony on the matters.

(c) the Application of Rules of evidence.
(d) the scope of cross-examination of witnesses.
(e) Petitioner's motion to strike direct testimony of Disciplinary Commission witness David Banton whom Petitioner had no opportunity to cross-examine.
(f) restriction of testimony of Petitioner's witness Paul Banton and Phyllis Wireman to matters not previously testified to during the disciplinary proceedings.
(g) Exclusion of any testimony proffered by Petitioner concerning an alleged political conspiracy against Petitioner, including any direct examination of reporter who filed initial grievances against him and direct testimony proffered to prove waiver by said reporter of any disclosure immunities under the Indiana Shield Law.
(h) Petitioner's motion to dismiss based on failure of Disciplinary Commission to strictly conform to provisions of the Disciplinary Rules concerning notice, findings of probable cause, and commencement of the hearing.
(i) denial of effective pre-trial discovery.

(2) Was the Petitioner deprived of his rights of confrontation under the Sixth and Fourteenth Amendment by the rulings of the Hearing Officer concerning:

(a) His cross-examination of witness on matters relating to their grant jury testimony.

(b) Petitioner's motion to strike direct testimony of Disciplinary Commission witness David Banton who disappeared before completion of his direct testimony.
(c) His examination of reporter who had filed initial grievances against him.

(3) Was Petitioner denied his right under the Sixth and Fourteenth Amendment to present favorable witness on his own behalf by the Hearing Officer's rulings concerning:

(a) Restriction of testimony of Petitioner's witnesses Paul Banton and Phylis Wireman to matters not previously testified about by other witnesses where witness Paul Banton was Petitioner's only corraborating witness on criminal allegations against him.
(b) Excluding any testimony of Petitioner's witness on alleged political conspiracy against Petitioner.
(c) Excluding any testimony proffered by Petitioner's witness concerning waiver by reporters of any disclosure immunities they may have under the Indiana Shield Law.

(4) Does Due Process of Law Under the fifth and fourteenth Amendment mandate that the Code of Professional Responsibility, the Code of Judicial Code and any statutory regulations of judicial conduct must be strictly construed.

(5) Does the assumption of Original Jurisdiction by the Supreme Court of Indiana over the alleged criminal conduct of Petitioner Violate the United States

Constitution in that Petitioner is thereby denied undue process under the Fifth and Fourteenth Amendment of the United States Constitution and equal protection under the law secured by the Fourteenth Amendment of the United States Constitution.

(6) Does the assumption of original jurisdiction by the Supreme Court of Indiana violate the guarantee of a Republican form of government under ARTICLE IV ∅ 4 of the United States Constitution?

(7) Does the disbarment of Petitioner deny him due process of law under the Fifth and Fourteenth Amendments in that the record lacks any relevant evidences of crucial elements of charges against him?

CONSTITUTIONS, STATUTES, and REGULATIONS INVOLVED IN INSTANT PETITION

(1) United States Constitution
ARTICLE IV 4
The United States shall guarantee to every State in this Union a Republican form of Government, and shall protect each of them against Invasion; and on Application of the Legislature or of the Executive (when the Legislature cannot be convened) against domestic violence.

Fifth Amendment
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service

in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impairtial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause and accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment
All persons born or naturlaized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(2) Constitution of Indiana
Article 3 § 1
s1. Three departments.-The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial; and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

Article 7 § 4
s4. Jurisdiction of Supreme Court.-The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal and retirement of justices and judges; supervision of the exercise of jurisdiction by the other courts of the State and issuance of writs necessary or appropriate in aid of its jurisdiction. The Supreme Court shall exercise appellate jurisdiction under such terms and conditions as specified by rules except that appeals from a judgment imposing a sentence of death, life imprisonment or imprisonment

for a term greater than ten years shall be taken directly to the Supreme Court. The Supreme Court shall have in all appeals of criminal cases, the power to review all questions of law and to review and revise the sentence imposed. (As added November 3, 1970.)

Article 7 § 13 Removal of Circuit Court Judges and Proesecuting Attorneys:

Any Judge of the Circuit Court or Prosecuting Attorney, who shall have been convicted of corruption or other high crime, may, on information in the name of the State be removed from office by the Supreme Court or in such manner as may be prescribed by law.

(3) Federal Statutes
28 U.S.C. § 1257 (3)
State courts; appeal; certiorari
Final judments or decrees rendered by the highest court of a State in which a decision could behad, may be reviewed by the Supreme Court as follows:
(1) By appeal, where is drawn in question the validity of a treaty or statue of the United States and the decision is against its validity.
(2) By appeal where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States,

and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statue of the United States is drawn in question or where the validity of a State statute is drawn in question on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commision held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals. (C.646, &1, 62 Stat. 929; July 29, 1970, P.L. 91-358, Title I, Part D, Subpart 2, & 172(a)(1), 84 Stat. 590).

(4) State Statutes
Indiana Shield Law
Burns Indiana Statutes Annotated, Code Edition 34-3-5-1
34-3-5-1 (2-1733). Newspapers, television and radio stations - Pre-associations-Employees and representatives-Immunity.-Any person connected with, or any person who has been so connected with or employed by, a newspaper or other

periodical issued at regular intervals and having a general circulation, or a recognized press association or wire service as a bona fide owner, editorial or reportorial employee, who receives or has received income from legitimate gathering, writing, editing and interpretation of news, and any person connected with a licensed radio or television station as owner, official, or as an editorial or reportorial employee who receives or has received income from legitimate gathering, writing, editing, interpreting, announcing or broadcasting of news, shall not be compelled to disclose in any legal proceedings or elsewhere the source of any information procured or obtained in the course of his employment or representation of such newspaper, periodical, press association, radio station, television station, or wire service, whether published or not published in the newspaper or periodical, or by the press association or wire service or broadcast or not broad cast by the radio station or television station by which he is employed. (Acts 1941, ch. 44 & 1, p.128; 1949, ch. 201 & 1, p. 673; 1973, P.L. 319 & 1, p.1731.)

Burns Indiana Statutes Annotated
Code Edition
35-1-25-2 (9-1303). Judge related to party or formerly counsel in case -Special judge.-No judge of

any court shall preside in or try any criminal cause, where he is related to the defendant by marriage or by blood, within the sixth degree of consanguinity, nor where he has been of counsel in the cause, either for the state or for the defendant; and in either of such cases it shall be the duty of the regular judge to select a special judge to try such cause. (Acts 1905, ch. 169, s 205, p.584.)

(5) **Code of Professional Responsibility, Admission and Disciplinary Rule (DR) 1-102 Misconduct**

(A) A lawyer shall not

(3) engage in illegal conduct involving moral turnpitude.

(4) engage in conduct involving dishonesty, fraud, deceipt or misrepresentation

(5) engage in conduct that is prejudicial to the administration of justice.

(6) engage in any other conduct that adversely reflects on his fitness to practice law.

(6) Admission and Discipline Rule (DR) 7-105 Avoiding Even the Appearance of Improprity

(A) A lawyer shall not accept private employment in a manner upon the merits of which he has acted in a judicial capacity.

(C) A lawyer shall not state or

imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislature body, or public official.

Admission and Discipline Rule 23 Section 10 (a)

(a) Upon receipt of a written, verified claim of misconduct (hereinafter referred to as "the grievance"), from a member of the Commission and completion of such preliminary investigation as he deems appropriate, the Executive Secretary shall:

1. Dismiss the claim, with the approval of the Commission, if he determines that it raises no substantial question of misconduct; or
2. If he determines that it does raise a substantial question of misconduct, send a copy of the grievance by certified mail to the attorney against whom the grievance is filed (hereinafter referred to as "the respondent") and shall request a written response within twenty (20) days after the respondent receives a copy of the grievance.

In the event of a dismissal as provided herein, the person filing the grievance and the respondent shall be given written notice of the Executive Secretary's determination. In the event of a determination that a substantial question exists, the matter shall proceed to (b) hereinafter. Amended November 30, 1971.

Admission and Discipline Rule 23, Section 10 (b)

"Thereafter, within forty-five (45) days, after notice to the Respondent, if, the executive secretary, upon consideration of the grievance, the preliminary investigation and any response from the respondent, determines there is a reasonable cause to believe that the respondent is guilty of misconduct the grievance shall be docketed and investigated. If he determines that no such reasonable cause exists, the grievance shall be dismissed with the approval of the commission. In either event, the person filing the grievance (hereinafter referred to as 'the complainant') and the respondent shall be given written notice of the executive secretary's determination."

Admission and Discipline
Rule 23 Section 13A
Section 13. Hearing Officers
In addition to the powers and duties set forth in this Rule, hearing officers shall have the power and duty to:

(a) conduct a hearing on the complaint of misconduct within sixty (60) days after the Commission's determination of reasonable cause;
(b) administer oaths to witnesses;
(c) receive evidenceand make written findings of fact and recommendations to the Court; and
(d) do all things necessary and proper to carry out their responsibilities under this Rule.

Code of Judicial Conduct
Canon I. Avoidance of Impropriety

A Judges official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and in his personal behavior, not only upon the Bench and the performance of judicial duties, but also in his everyday life, he should strive to be beyond reproach.

Canon 6.

No Judge shall participate in any cause which involves any business in which the judge or any member of his family has a pecuniary interest.

Canon 15.

A Judge shall promptly fully disclose any interest, personal or financial, which he may have in any contested litigation.

STATEMENT OF THE CASE

On or about the 18th day of November, 1974, J. Michael Piggott filed with the Indiana Supreme Court Disciplinary Commission a verified complaint for violations of the Code of Judicial Conduct and Ethics against the Petitioner by which complaint said J. Michael Piggott agreed under penalty of perjury to testify at any hearing held in the matter. Thereafter and within 20 days Petitioner made written answer to charges of violation of Code of Judicial Conduct and Ethics thereto. On January 7, 1975, without first making a preliminary investigation and determination that there was reasonable cause to believe that the Petitioner was guilty, as required by Admission and Discipline Rule 23, Section 10(b), the Executive Secretary docketed said complaint

as Docket No. D-111874B. On May 12, 1975, a Verified Complaint for Disciplinary Action was filed by the Disciplinary Commission in this Court against Petitioner in four counts, four of the counts were included in the original complaint of J. Michael Piggott, but charged violations of both the Code of Judicial Conduct and Ethics and Code of Professional Responsibility for Attorneys at Law. On May 19, 1975, Richard H. Grabham filed with the Disciplinary Commission a verified complaint for violation of the Code of Professional Responsibility against Petitioner to which Petitioner made response within 20 days. On June 20, 1975, Petitioner filed his motion to dismiss said Verified Complaint for failure of the Disciplinary Commission to comply with the Procedural Requirements of Admission and Disciplinary Rule No. 23, and for failure of a hearing officer to conduct a hearing within sixty (60) days of the determination of the Disciplinary Commission of reasonable cause. On July 18, 1975, without first making a preliminary investigation and determination that there was reasonable cause to believe that the Respondent was guilty, as required by Admission and Discipline Rule 23, Section 10(b), the Executive Director docketed said complaint of May 19, 1975, after Amended Complaint were filed, the hearing was commenced on January 19, 1976.

The hearing was not begun within sixty days after the grievance was docketed. (See Court opinion below printed in Appendix A hereto infra page 48.) Petitioner's motion to dismiss at preliminary hearing was denied by the hearing officer on review by the Supreme Court Petitioner cited failure to strictly comply with the procedure under

Admission and Discipline Rules as denying him due process (Petitioner's Brief p.100 printed hereto infra in Appendix B page 62,63) The Supreme Court ruled that the docketing of the grievance infers a finding of reasonable cause and that the sixty day requirement for holding a hearing was not a jurisdictional requirement nor did the failure to hold a hearing within sixty days after docketing prejudice Petitioner. (Court's opinion printed hereto infra in Appendix A page 48)

(2) The evidence adduced at the disciplinary hearing shows the following summarized facts concerning alleged improper judicial conduct and improper professional conduct as an attorney.

(a) Mr. Larry Mathes - Petitioner represented Mr. Mathes' former wife in her civil divorce action against Mr. Mathes. On information filed by the prosecuting office, Mr. Mathes was issued a citation for failure to provide support as ordered by Tippecanoe Superior Court. A court-ordered attorney fee for services provided by Petitioner in the civil divorce action was outstanding at the time Mr. Mathes appeared before Petitioner in City Court. Petitioner's law partner, Daniel K. Houston, had appeared the same morning in Tippecanoe Superior Court for the purpose of obtaining enforcement of the attorney fee order issued in the former divorce proceedings. Mr. Mathes was not a client, relative or party to any litigation involving Petitioner as an attorney. Upon being told by Mr. Mathes that he (Mathes) was delinquent on child support and that he had been ordered to pay forty-five ($45.00) a week in Superior Court, Petitioner entered a support order of Forty-five ($45.00) a week and suspended sentence for two years, provided support payments were kept current.

(Tr. p. 56-99)
(b) Support citation of Mr. Kenneth Hunter - Again Petitioner represented Defendant's wife in a civil divorce action against Mr. Hunter. Divorce was final on June 3, 1974, and the child support citation was issued on August 22, 1974, upon information filed in the prosecutor's office, with Mr. Hunter appearing in City Court on September 5, 1974. An agreement was entered between Mr. Hunter and the Deputy Prosecutor with regard to the payment of support. The existence of this agreement is verified by appropriate notations in the docket sheet. (Tr. p. 1527, question 25 and at Tr. p. 2038, question 225-226). Petitioner merely entered the order reflecting the child support agreement. No findings of fact or law were made by Petitioner in the matter of Mr. Hunter. (Tr. p. 8-56)
(c) Mr. Phillip Hammond - Petitioner represented Mr. Hammond's wife in a civil divorce action against him. After the divorce became final, upon information filed by the prosecutor's office charging Mr. Hammond with failure to provide, petitioner issued a summons. Mr. Hammond obtained counsel who filed a Motion of Change of Venue from the Judge. The motion was granted by Petitioner. No other connection between Mr. Hammond's case and Petitioner as Judge was cited by the commission of substantiated by evidence before the Hearing Officer. (Tr. p. 148-160)
(d) Richard Smith - Petitioner had represented Richard Smith in the year 1970. In March 25, 1974, Petitioner sitting as Judge sustained State's motion to dismiss charges of First Degree Burglary, Disorderly Conduct and Resisting Arrest against Smith. On May 20, 1974, Petitioner sustained State's motion

to dismiss charges of Armed Robbery against Smith. On May 21, 1974, on State's motion, Petitioner dismissed charges against Smith of Driving while Suspended, Reckless Driving and Disorderly Conduct. On June 18, 1974, Petitioner failed to find probable cause to issue arrest warrant for Smith on charges of Safe Burglary. (Tr. p. 537-1064)

The other judicial act alleged to be improper was Petitioner's ordering the release of David Banton from jail after Banton had posted sufficient bail in accordance with the bond schedule which Petitioner had posted in the jail.

Petitioner objected to the introduction of all exhibit and testimony concerning his judicial acts on the ground that such acts were not subject to disciplinary proceedings. (Tr. p. 18, 63, 123, 188, 189, 595) Each objection was overruled by the hearing officer. On review by the Supreme Court of Indiana, Petitioner urged in his brief that his judicial acts consisted of primarily ministerial acts involving neither findings of fact nor law and which were not within the express provisions of the Code of Professional Responsibility and Code of Judicial Conduct. (Assignment of Error, Petitioner's Brief p. 97-98) He further urged that there was no evidence showing violation of any express provision of the Judicial Code or Indiana Statutes requiring his disqualification as Judge, and that his acts were at most merely voidable. (Petitioner's Brief p. 238-243) The court rejected Petitioner's arguments but ruled expressly only upon the argument advanced that Petitioner's judicial acts were at most voidable acts. Supreme Court's opinion printed hereto infra in

Appendix A page 51 .
(3) The Hearing Officer made the following rulings during the disciplinary hearing;
(a) Inconsistent and erroneous rulings over Petitioner's objections regarding scope of direct examination and cross-examination of witness on matters which they had given testimony to a grand jury. The hearing officer permitted direct testimony on such matters by Commission Witness David Banton (Tr. p. 198-238); he denied Petitioner the opportunity to cross-examine Commission witness Laura Shepard concerning pictures taken of stolen guns. (Tr. p. 1215-1364) Petitioner cited such rulings as a denial of due process (Petitioner's Brief p. 100 printed hereto infra in Appendix B page 63)
(b) Inconsistent and erroneous rulings over Petitioner's objections on the admissibility of hearsay testimony proferred by Disciplinary Commission and of hearsay testimony proferred by Petitioner. The hearing officer permitted hearsay testimony of Commissioner witness Daivd Banton (Tr. p. 274-275); excluded hearsay testimony and cross-examination of Commissioner witness Billy Horn (Tr. p. 363); excluded hearsay testimony and cross-examination of Commissioner witness Robert Osborn (Tr. p. 395-397); permitted hearsay testimony and re-redirect of Commissioner witness Richard Dean Smith (Tr. p. 1028-1031); permitted Commission to introduce hearsay evidence (Tr. p. 2403-2412) On review Petitioner cited such rulings as a denial of due process (Petitioner's Brief p. 100-101 printed hereto infra in Appendix B page 63) The Supreme Court of Indiana did not expressly rule in the assignment of errors.
(c) Permitting cross-examination of Petitioner on substantive matters which the record clearly

indicates were not the subject of Petitioner's direct testimony. (Tr. p. 2253, 2257, 2267-2268, 2304-2325, 2332-2337, 2381-2385) On review to the Supreme Court Petitioner cited such rulings as erroneous (Petitioner's Brief p. 30-40.) without reference to any violation of his constitutional right. The Supreme Court of Indiana did not expressly rule on this assignment of error.
(d) Restricted direct testimony of Paul Banton, Petitioner's only corroborating witness concerning criminal charges, to matters not covered by prior testimony of other witnesses. This restriction was imposed, over Petitioner's objections because upon Petitioner's request Paul Banton had listened to a tape recording of prior testimony of other witnesses. The hearing officer ruled this constituted a flagrant violation of the separation of witness rule. (Tr. p. 1611-1619, 1628-1635) On review Petitioner cited this ruling as a denial of due process and of his right under the Sixth Amendment to present favorable witnesses. (Petitioner's Brief p. 100 printed hereto infra in Appendix B page 62 and 271-272 printed hereto in Appendix B page 64,65 .) The Supreme Court held that the trial court has discretion as to whether or not to allow a witness to testify in these instances.
(e) Restricted direct testimony of Phyllis Wireman to matters not testified about by previous witness, because she had listened to tape recording of previous testimony. The hearing officer ruled this to be a flagrant violation of the separation of witness rule (Tr. p. 1567-1586, printed hereto infra in Appendix B page 64) On review Petitioner cited this ruling as a denial of

due process and of his right under the Sixth Amendment to present favorable witness (Petitioner's Brief p. 100-101 printed hereto infra in Appendix B page 62,63 and p.p. 271-272 printed hereto infra in Appendix B page 64,65 .) The supreme Court ruled that the trial court has discretion as to whether or not to allow a witness to testify in these instances.

(f) At the conclusion of the Disciplinary Commission's case, the hearing officer denied Petitioner's motion to strike direct testimony of Petitioner's alleged accomplice David Banton, who disappeared before completing his direct testimony on behalf of the Commission. The Hearing officer ruled that he would reserve a fuling until it could be determined whether Banton would be present again at the hearing. (Tr. p. 1681(a)) Petitioner renewed the motion to strike on several occasions. (Tr. p. 1542-1548, 1696(a), 1724-1727, 1890-1892) On review by the Supreme Court, Petitioner urged that he was denied his right to confrontation under the Sixth and Fourteenth Amendments by this ruling. (Petitioner's Brief p. 280-289) Also in his Brief to the Supreme Court, Petitioner urged that the failure to strike David Banton's testimony denied him due process of law (Petitioner's Brief p. 100-101, printed hereto infra in Appendix B page 62,63) The Supreme Court of Indiana held that in the interest of fairness it would disregard the testimony of David Banton. (Court's opinion printed hereto infra in Appendix A page 54)

(g) Exclusion of any testimony concerning alleged political conspiracy against Petitioner (Tr. p. 144-145, 527-529, 530-531, 1709-1710, 1723, 1727, 1730, 1820) and excluded direct testimony proffered by

Petitioner to establish waiver by reporters of their disclosure immunity under the Indiana Shield Law (Tr. p. 1944-1947, 1957-1964.) Petitioner cited to the Supreme Court these exclusions as denying him due process of law (Petitioner's Brief p. 100). The Supreme Court ruled that "the record demonstrates that this alleged conspiracy did not involve any witnesses to the proceeding. The Respondent was allowed to demonstrate bias and prejudice of the witness who testified; he was only precluded from developing evidence of prejudice of those who had not adversely testified against him. This Court finds that this evidence was immaterial and properly excluded." The Court also ruled that a individual who files a grievance is not an accuser since the Commission through its investigation and filing the complaint becomes the accuser (Court's opinion printed hereto infra in Appendix A page 49)

(h) Excluded direct testimony which Petitioner's offer of proof would have shown that news reporters had waived disclosure immunity under the Indiana Shield law through disclosures to third parties. Petitioner's witness Roller was not permitted by the hearing officer to testify as to any disclosure by news reporter Janet Johnson to him (Roller). (Tr. p. 1944-1947) Petitioner was not permitted to offer testimony that news reporter J. Michael Piggott had waived disclosure immunity by his disclosures to the Indianapolis Star. (Tr. p. 1723-1724) On review to the Supreme Court of Indiana, Petitioner cited these rulings as violating his right under the Sixth Amendment and as denying him due process. (Petitioner's Brief p. 233-234) In its opinion, the Indiana Supreme Court ruled that the question

of waiver of immunity by the reporter was irrelevant because Petitioner sought to develop through the reporters testimony concerning a political conspiracy against him where Petitioner did contend that the news reporters were involved in such a conspiracy. (Court's opinion printed herein infra in Appendix A page 50)
(4) Petitioner was charged with encouraging Richard Dean Smith and Paul Banton to perpetrate first degree burglary. Petitioner's corroborating witness, Paul Banton, was restricted in his direct testimony to matter not previously testified about by other witnesses. (Because of alleged violation of separation of witness rule) Subsequent to the disciplinary proceedings, Petitioner was convicted of charges relating to his alleged criminal conduct on which there was testimony during the disciplinary proceedings. The Indiana Supreme Court reviewed the entire transcript as a trial court would in making findings of fact and of law. Appeal of Petitioner's subsequent conviction is now pending.

During the disciplinary proceedings, only Richard Smith's testimony stated that Petitioner had encouraged the burglary of coins and guns. Smith's testimony is totally unreliable as is apparent from the record reflecting the cross-examination of him. (Tr. p. 798-799, 1604a-1605a containing statements contradicting his direct testimony implicating Petitioner in the burglaries and stating that he had obtained immunity from prosecution; (Tr.p.1751-1759 where Petitioner's witness Ronald Cox testified that while he (Cox) was a fellow inmate of Smith, Smith told him that he was going to falsely implicate a Lafayette Judge in criminal activities) On review by the Indiana

Supreme Court, Petitioner cited as error that the evidence is insufficient to support the findings of criminal conduct on the part of Petitioner, (Petitioner's Brief p. 163-264) The Indiana Supreme Court found Petitioner to have encouraged the burglary of coins and guns. (Court's opinion printed hereto infra in Sppendix B page 59,60)

WHY WRIT OF CERTIORARI SHOULD BE GRANTED

Petitioner respectfully submits that writ of certiorari should be granted in the instant cause for the following reasons:
(1) Petitioner was denied a fair and impartial hearing as reflected in the inconsistent, erroneous and arbitrary rulings by the Hearing Officer set forth herein. Disciplinary Proceedings are of a quasi-criminal nature. In Re Ruffalo 390 U.S. 544, 551, 20 L.Ed. 2d 117, 88 S.Ct., 1222, 1226 reh denied 391 U.S. 961, 20 L.Ed.2d 874, 88 S.Ct. 1833 (1968). As a quasi-criminal proceedings, a disciplinary hearing must adhere to the most exacting demands of due process of law. See Spevack v. Klein 385 U.S. 511, 17 L.Ed.2d 574, 87 S.Ct. 625 (1967) Willner v. Committee on Character & Fitness 373 U.S. 96, 106, 10 L.Ed.2d, 224, 83 S.Ct. 1175, 1182 (1963)(Per Justice Goldberg's comment that "certainly lawyers and courts should be particularly sensitive of and have a special obligation to respect the demands of due process.") "[W]hen a State seeks to . . . disbar a lawyer it must proceed according to the most exacting demands of due process of law." Law Students Civil Rights Research Council Inc. v. Wadmond (1971) 401 U.S. 154,

174, 27 L.Ed.2d 749, 91 S.Ct. 720, 731 (1971) (Black and Douglas J.J. in dissenting opinion)

The prejudicial effect of the Hearing Officer's denial of Petitioner's motion to strike the direct testimony of missing witness David Banton was not purged by the Supreme Court of Indiana ruling that such testimony was disregarded by that Court in reaching its decision. The failure to strike said testimony at the conclusion of the Commission's case cast an unfair burden upon Petitioner in the presentation of his defense in two main respects: (a) Petitioner was denied right of confrontation under the Sixth Amendment of the United States Constitution. The right of confrontation includes the opportunity of cross-examination of accusers. Davis v. Alaska 415 U.S. 308, 315, 39 L.Ed.2d 347, 94 S.Ct.1105 (1974); Douglas v. Alabama 380 U.S. 415, 418, 13 L.Ed.2d 934, 85 S.Ct. 1074 (1965).

The denial of the right to effective cross-examination is a "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it". Brookhart v. Janis 384 U.S. 1, 3, 16 L.Ed.2d 314, 86 S.Ct. 1245, (1966). If the denial of the opportunity to cross-examine a witness in any way seriously hampered or embarrassed the Defendant's effort to get at the truth of the facts, the testimony of the witness must be striken. See Smith v. United States 331 F.2d 265, 277-278 (8th Cir. 1964); United States v. Cardillo 316 F.2d 606, 611 (2nd Cir.) cert. den 375 U.S. 822, 11 L.Ed.2d 55 84 S.Ct. 60 (1963).

(b) The failure to strike said testimony at the conclusion of the Commissioner's case imposed a burden upon Petitioner to

anticipate what testimony of missing witness David Banton he should rebut. The Indiana Supreme Court's merely extracting the direct testimony of witness David Banton in evaluating the sufficiency of the evidence did not cure the prejudicial effect upon Petitioner's presentation of his defense. The hearing officer's inconsistent and erroneous ratings on hearsay testimony and grand jury testimony, and improper cross-examination of Petitioner further impaired Petitioner in his presentation of his defense.

Before an error inviolation of federal constitutional rights can be held harmless, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt". Chapman v. California 386 U.S. 18, 24, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967).

Defense counsel has a right to impeach a witness by showing that because of the witnesses incarceration in a federal prison at the time of trial, the witnesses testimony was biased "as given under promise or expectation of immunity or under coercive effect of his detention by officers of the United States". Alford v. United States 282 U.S. 687, 75 L.Ed. 624 S.Ct. (1931) Petitioner was not permitted to present testimony of his witness Ronald Cox as to Smith's behavior while he and Cox were fellow inmates.

The rights under the Sixth Amendment of notice, confrontation and compulsory process are part of the due process of law that is guaranteed by the Fourteenth Amendment to Defendants in criminal courts of the states. Faretta v. California 422 U.S. 806, 818, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975).

(2) The Petitioner has the right under the Sixth and Fourteenth Amendments to present

a defense through the calling and interrogation of favorable witnesses. See Faretta v. California 422 U.S. 806, 818, 45 L.Ed 2d 562, 95 S.Ct. 2525 (1975).

Petitioner was denied this right under the Sixth and Fourteenth Amendments by the Hearing's Officer's restricting the testimony of Petitioner's witnesses Phyllis Wireman and Paul Banton, his sole corrabating witness, to matters not inclueded in previous testimony during the hearing. This exclusion of testimony was based on an alleged willful violation of separation of witness order. However, the precise ruling initially was for a closed hearing. Petitioner understood that his motion for a closed hearing was granted to exclude reporters and the public from the proceedings. Where a witness is Defendant's sole corroborating witness, the exclusion of his testimony for violating the separation of witness rule results in prejudice reaching constitutional proportion. See Braswell v. Wainwright 463 F2d 1148, 1153 (5th Cir. 1972) cf Washington v. Texas 388 U.S. 14, 18 L.Ed 2d 1019 , 87 S. Ct. 1920 (1967). The restriction placed upon the testimony of Petitioner's witnesses Paul Banton and Phyllis Wireman had the effect of compelling Petitioner to testify. This Court has recognised that the Fifth Amendment right against self-incrimination adheres in disciplinary proceedings. See Spevack v. Klein 385 U.S. 511, 17 L.Ed. 2d 574, 87 S.Ct. 625 (1967).

"While the 'Witness Rule' has a valid purpose and can contribute to the search for the turth, a breach of the rule can not be used to deny a crminal defendant his constitutional right to obtain and present witnesses in his favor." Braswell

v. Wainwright, supra at page 1157. A simple rule of courtroom "fairness" may not be misused to destroy a sacred constitutional right. Braswell v. State 400 U.S. 873, 27 L.ED.2d 111, 91 S.Ct. 106 (1970). (Dissenting opinion of Black, with Douglas and Brennan J.J. joining.)

An additional assault upon Petitioner's rights under the Sixth and Fourteenth Amendment occured throught the Hearing Officer's denial to Petitioner of the opportunity to present testimony regarding Petitioner's allegation that all charges against him were merely the result of a political conspiracy. In this regard, the issue of waiver of disclosure immunity by certain reporters was relevent if Petitioner offered to prove that such reporter had knowledge of a political conspiracy. Petitioner has the right to conduct his defense under his own theory.

(3) Petitioner was denied due process of law under the Fifth and Fourteenth Amendments by the failure of the Hearing Officer and Supreme Court of Indiana to strictly construe the Code of Judicial Conduct and Admission and Discipline Rules. Petitioner's judicial conduct consisted primarily of ministerial acts involving no exercise of judicial discretion or independent findings of fact and law. He had no family, attorney-client or business relationship with the four defendants who appeared before him, nor did he have an interest in the disposition of these cases. Indiana Code 35-1-25-2 provides that:

No Judge of any court shall preside in or try any criminal cause, where he is related to the defendant in marriage

or by blood within the 6th degree of consanquenity nor when he has been counsel in the cause, either for the State or for the defendant.

The Indiana Code of Judicial Conduct Canon 6 provides that a "Judge should not act in a controversy where a near relative is a party. Canon 11 provides:

"No judge shall participate in any cause which involves any business in which the judge or any member of his family has a pecuniary interest."

Finally Canon 15 provides:

"A Judge shall promptly fully disclose any interest, personal or financial, which he may have in any contested litigation."

Petitioner sitting as judge does not constitute a violation of the above provisions. Contempt proceedings for failure to provide support are separate actions from support actions brought pursuant to divorce actions. See Gilmour v. State 230 Ind. 454, 104 N.E.2d 127 (1952); Bruce v. State 230 Ind. 413 104 N.E.2d 129 (1952). Thus, Petitioner's representation of defendant's former wife against a defendant in divorce proceedings would not disqualify Petitioner to sit as Judge in a child support citation against defendant. Petitioner's ordering the release of David Banton after the latter had posted required bond and had spent four hours in detention did not represent an adjudication of the merits of that offense charged against Banton.

Statutory regulations of attorney conduct must be strictly construed. Klingensmith v. Kepler 41 Ind. 341 at page 344 (1872); State v. Crossland 152 Ohio St. 109, 88 N.E.2d 289 at page 290 (1949)

In re Chappel 33N.E.2d 393 at page 397 (1930). Other states have held that in the absence of violations of express specific rules, regulations or laws a Judge may not be disciplined for an erroneous exercise of discretion not involving fraud, dishonesty or crimes. See In re McGarry 380 Ill. 359, 44 N.E.2d 7, 10 (1942); In re Troy (Mass) 306 N.E.2d 203, 217 (1973). These cases reflect a disposition toward strictly construing regulations or statutes governing conduct of judges. This Court has ruled that administrative agencies must scrupulously observe departmental safeguards of due process. Vitarelli v. Seaton 359 U.S. 535, 3 L.Ed2d 1012, 79 S.Ct. 968 (1959). It is submitted that there must be strict conformance to procedural rules of Admission and Discipline in investigation, notice, filing complaints, and conducting the hearing. In Re Ruffalo 390 U.S. 544, 20 L.Ed.2d 117, 88 S.Ct. 1222 Otherwise, the filing of a grievance by a third party who is not required to testify becomes a fishing expedition without any time limitations in which to find probable cause for a complaint to be filed by the Commission. The docketing of the complaint without express finding of probable cause is analogous to the issuing of a warrant without finding of probable cause.

(4) The Disciplinary Commission and the Supreme Court of Indiana lacked original jurisdiction over Petitioner's alleged criminal conduct not related to Petitioner's practice of law or to his judicial conduct.

The Supreme Court of Indiana has original jurisdiction "in admission to the practice of law; discipline or disbarment

of those admitted; the unauthorized practice of law; discipline, removal and retirement of justice and judges". Article 7 §4 Constitution of Indiana.

Article 7 §13 of the Constitution of Indiana provides "any Judge of the Circuit Court or prosecuting attorney, who shall have been convicted of corruption or other high crime, may on information in the name of the State be removed from office by the Supreme Court or in such other manner as may be prescribed by law. (emphasis added)

The Supreme Court of Indiana held in State v. Patterson 181 Ind. 660, 105 N.E. 228, 229 (1914) that the phrase "or in such other manner as may be prescribed by law" in the then existing constitutional provisions cannot be held as relating to causes for removal but merely permits other procedures for removal of judges. See also State v. Dearth 201 Ind. 1, 164 N.E. 489 (1929).

A Judge may be removed only after "a judgment of conviction has been pronounced". State v. Patterson supra 105 N.E. at 230. "[W]hen a conviction has resulted at the hands of a tribunal competent to render a judgment of the character contemplated and the officer is in prison and perforce unable to administer his office, occasion then arises when this Court may on information remove the Judge". State v. Dearth 201 Ind. 1, 164 N.E. 489, 492 (1929).

Provisions of State Constitutions establishing jurisdiction or authority are to be strictly construed. State v. Patterson 181 Ind. 660, 105 N.E. 228, 229 (1914); State v. Dearth 201 Ind. 1, 164 N.E. 489 (1929) (citing State v. Patterson); State ex rel Gremillion v. O'Hara (Louisiana) 252 La. 540, 211 So.2d 641 (1968); McMillen v.Diehl 128

Ohio St. 212, 190 N.E. 567 (1936); Barnett v. Hepburn 121 Okla. 268, 249 P 921 (1926); Johnson v. Mooney (Texas Civ App) 241 S.W. 308 (1922); Re Carney 182 Va. 907, 30 S.E.2d 789 (1944); State ex rel Monongahela Valley Traction Co. v. Beard 84 W.Va. 312, 99 S.E. 452 (1919).

A strict Construction of the constitution of the Indiana would provide original jurisdiction to the Indiana Supreme Court over alleged criminal conduct of judges only upon conviction for those charges. Petitioner submits that the same criteria of a conviction adheres before a disciplinary proceeding may entertain allegations of criminal conduct by attorneys. Moreover, the rationale for holding that the Supreme Court of Indiana does not have original jurisdiction over the alleged crimes conducted may be demonstrated. In the instant cause, the Supreme Court of Indiana has examined and evaluated transcript of the disciplinary proceedings which contain testimony concerning alleged criminal conduct of Petitioner. This alleged criminal conduct relates to charges for which Petitioner was subsequently convicted in a lower court. In disciplinary proceedings the Supreme Court of Indiana "acts as a trial court and must determine issues of fact". In Re Murray ____ Ind. _____ 362 N.E.2d 128, 130. This participation by the Court in examining the transcript in determining findings of facts "clearly distinguishes the disciplinary proceedings from an appeal". In Re Murray supra 362 N.E.2d 128, 130.

The total impact of such an independent findings of facts by the Supreme Court of Indiana is to deny Petitioner effective appeal from subsequent lower court

convictions for alleged criminal conduct which relates to conduct adjudicated in the disciplinary proceedings. Once the right of appeal is granted, it cannot be arbitrarily or capriciously denied to some while granting it to others. Mayer v. Chicago 404 U.S. 189, 30 L.Ed.2d 372, 92 S.Ct. 410 (1971). Moreover, the right of appeal to the highest state court must be provided. Burns v. Ohio 360 U.S. 252, 3 L.Ed.2d 1209, 79 S. Ct. 1164 (1959). The power of states to control the practice of law cannot be exercised so as to abrogate federally protected rights. Johnson v. Avery 393 U.S. 483, 490 21 L.Ed.2d 718, 89 S. Ct. 747 (1969). In the instant case, the Indiana Supreme Court has independent and separate knowledge of testimony regarding the subject of an appeal of a conviction. This denies Petitioner due process and equal protection of the laws. cf In Re Murchison 349 U.S. 133, 99 L.Ed. 2d 942, 75 S.Ct. 623 (1955).

(b) Original jurisdiction over alleged criminal conduct of an attorney impairs, frustrates, and usurps the function of the prosecuting attorney, and therefore, violates the separation of powers doctrine expressed in the Constitution of Indiana, Article 3 §1.

Under the separation of powers doctrine, many state courts have reversed lower courts rulings which usurped or impaired the exercise of prosecutorial authority. See People v. Stinger 22 Ill. App. 3rd 371, 317, N.E.2d 340 (1976); People v. Baron 130 Ill. App. 588, 264 N.E. 2d 423, 425-426 (1970); People v. District Court in and for County of Larimer 103 Cal. Rptr. 645, 27 Ca. 3d 193, 527 P.2d 50 (1974);

Smith v. Superior Court 101 Ariz. 559, 422 P2d 123, 124 (1967); People ex rel Leonard v. Papp 386 Mich. 672, 194 N.W.2d 693, 699 (1972).

Separation of powers among the legislation, executive and judicial branches is essential for the guarantee of a Republican form of State government under Article IV §4 of the United States Constitution. See Van Sickle v. Shanahan 212 Kan. 426, 511 P.2d 223 (1973). cf People v. Stinger 22 Ill. App 3rd 371, 317 N.E.2d 340 (1974); People v. Baron 130 Ill. App. 588, 264 N.E.2d 423, 425-26 (1970); People v. District Court in Ind. for County of Larimer 103 Cal. Rptr. 645, 27 Ca. 3d 193, 527 P.2d 50 (1974); Smith v. Superior Court 101 Ariz. 559, 422 P.2d 123, 124 (1967); People Ex rel Leonard v. Papp 386 Mich. 672, 194 N.W.2d 693, 699 (1972).

Petitioner submits that there can be no clearer infringement of the guarantee of a Republican form of government than where the provisions of the state constitution are abrogated by a loose interpretation of its separation of powers provisions and where an important responsibility of the state executive department is usurped and impaired by the exercise of original jurisdiction by the highest State Court over alleged criminal conduct.

Contrary to previous cases presenting the question of the guarantee of a Republican form of government, the instant cause does not pose a "textually demonstrable constitutions committment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial

discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiability of embarrassment from multifarious pronouncements by various departments on one question". Baker v. Carr 369 U.S. 186,217,7 L.Ed.2d 663, 82 S.Ct. 691 (1962) "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the grounds of a political question's presence: Baker v. Carr supra 369 U.S. at 217. For these reasons, it is submitted that the Indiana Supreme Court lacked original jurisdiction over the subject matter of alleged criminal conduct. Where the court lacked jurisdiction over the subject matter, a defendant is denied due process of law under the Fourteenth Amendment.

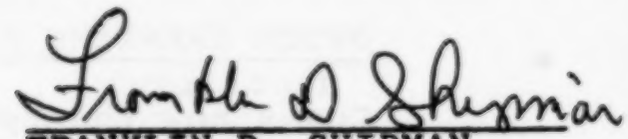
(4) The Petitioner was denied due process in that the record lacks any relevant evidence substantiating the charges of improper judicial conduct. See Vachun v. New Hampshire 414 U.S. 478, 38 L.Ed. 2d 666, 94 S.Ct. 644 (1974); Thompson v. Louisville 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624 (1960)

Where the record shows that the testimony of the only witness who allegedly participated in criminal conduct with the defendant contains self-contradictions as to defendant's actual criminal conduct, it is submitted that such testimony is totally unreliable and insufficient to satisfy the due process requirements under Vachun and Thompson supra.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



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IN THE
SUPREME COURT OF INDIANA

IN THE MATTER OF

CAUSE NO. 575 S 122

LEWIS T. WIREMAN

ORDER GRANTING MOTION TO STRIKE

Comes now the respondent and files his "Motion to Correct Errors" and "Motion for Stay of Proceedings", and comes now the Indiana Supreme Court Disciplinary Commission and files its "Motion to Strike Respondent's Motion to Correct Errors and to Strike Respondent's Motion for Stay of Proceedings". Additionally, bothy parties have filed memorandum of law concerning the motion to strike.

This Court, being duly advised in the premises, now finds that there is no authority for the filing of a Motion to Correct Errors as this cause now stands. Accordingly, this Court furhter finds that the relief sought in the Disciplinary Commission's Motion to Strike should be granted.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by this Court that Respondent's "Motion to Correct Errors" and Respondent's "Motion for Stay of Proceedings" are now stricken.

DONE the 21st day of February, 1978.

/s/ Richard M. Given
Richard M. Given
Chief Justice of Indiana

All Justices concur.

SUPREME COURT OF THE UNITED STATES

No. A-590

IN THE MATTER OF LEWIS T. WIREMAN,

Petitioner

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petion for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 13, 1978.

/s/ John Paul Stevens
Associate Justice of the Supreme Court of the United States

Date this 12
day of January, 1978.

IN THE MATTER OF
LEWIS T. WIREMAN

No. 575S122

SUPREME COURT OF INDIANA

DISCIPLINARY ACTION

PER CURIAM

This is a disciplinary proceeding before this Court on an amended seven-count complaint filed by the Disciplinary Commission pursuant to Admission and Discipline Rule 23, Section 12. A Hearing Officer was appointed; this cause has been heard; and the Hearing Officer has filed his Findings of Fact, Conclusions of Law and Recommendations. Respondent now petitions this Court for review of the findings of the Hearing Officer. Both parties have filed briefs in this cause.

The respondent has submitted numerous challenges to the procedure involved in the trial of this matter and the rulings of the Hearing Officer. These issues will be addressed in their order of presentation set forth in the briefs of the parties.

As his first assertion of error, respondent argues that he was denied due process of law by the Commission's alleged failure to follow Admission and Discipline Rule 23, Section 10(a)(2). The respondent contends that this rule, which affords the opportunity to respond to a grievance, was not followed relative to violations

of the Code of Professional Responsibility in that the initial complaint filed in this cause asserted violations of Judicial Canons and did not specifically assert violations of the Code of Professional Respondibility. Thus, respondent concludes that he was denied due process as to the charges of the complaint predicated on violations of the Code of Professional Responsibility.

This Court has recently held that a disciplinary grievance will not be strictly construed. In re Murray (1977), _____ Ind. _____, 362 N.E.2d, 128. In the Murray Case, this Court set forth the relationship of the grievance to the complaint as filed by the Disciplinary Commission.

"The complaint filed by the Disciplinary Commission in all disciplinary cases is predicated on the grievance filed, but it would be absurd to hold that the grievance must be strictly construed, and the complaint must be narrowly limited to charges specified in the grievance. The vast majority of grievances are filed by persons not skilled in the law; the function of the Disciplinary Commission is to review the grievances, dismiss those which are baseless, and then frame a complaint so as to place the alleged misconduct within the structure of the Code of Professional Responsibility."

(362 N.E.2d at 130)

This language, above quoted, has equal application to the present cause. The respondent was advised of the general nature of the charges against him. Accordingly, we find that the purpose

of Admission and Discipline Rule 23, Section 10(a)(2) has been met and there has not been a denial of due process.

The respondent next asserts a violation of the 14th Amendment of the United States Constitution by reason of the alleged failure of the Executive Secretary of the Disciplinary Commission to follow the provisions of Admission and Discipline Rule 23, Section 10(b), which provides as follows:

"Thereafter, within forty-five (45) days, after notice to the Respondent, if, the executive secretary, upon consideration of the grievance, the preliminary investigation and any response from the respondent, determines there is a reasonable cause to believe that the respondent is guilty of misconduct the grievance shall be docketed and investigated. If he determines that no such reasonable cause exists, the grievance shall be dismissed with the approval of the commission. In either event, the person filing the grievance (hereinafter referred to as 'the complainant') and the respondent shall be given written notice of the executive secretary's determination."

The records in this case demonstrate that within forty-five days of the filing of the grievance, the Executive Secretary gave the following notice to the respondent:

"Reference the Request for Investigation grievance filed against you with this Commission by J. Michael Piggott on November 18, 1974, Section 10 of A.D. Rule 23 requires the grievance be docketed within forty-five (45) days of your receipt of the above complaint, and since the in-

vestigation has not been completed, this grievance has been assigned Docket Number D-111874B."

"Upon completion of the investigation, you will be notified of the disposition of said cause."

The respondent argues that since there was no apparent finding of "reasonable cause", he was denied due process.

While the letter of notification was not the most artfully worded document and did not specifically dovetail with the provisions of Section 10(b), there is no doubt that the cause was docketed within the forty-five day requirement. The docketing of this matter infers a finding of reasonable cause. Thus, we find no merit in this assertion of error.

As his third assertion of error, the respondent argues that he was further denied due process when a hearing was not conducted within sixty days after a determination of reasonable cause. Respondent asserts that Admission and Discipline Rule 23, Section 13(a), which authorizes the appointed Hearing Officer to conduct a hearing within sixty days, is a jurisdictional requirement; it is respondent's position that the Hearing Officer should have granted his motion to dismiss after the sixty-day period had expired without a hearing.

Due process, as applied to disciplinary proceedings involving attorneys, requires notice of the charges and an opportunity to be heard. In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed. 117, reh. den. 391 U.S. 961, 88 S.Ct. 1833, 20 L.Ed. 874; In re Stivers (1973), 260 Ind. 120, N.E.

2d 804; In re Murray, supra. Beyond these requirements, there is no authority to suggest that the expiration of a time period would establish a constitutional infirmity mandating dismissal of all charges. There may be hypothetical factual situations where this expiration of time destroys the fundamental fairness of the entire disciplinary process; however, there is no evidence in the present case to warrant such determination. Accordingly, this Court now overrules Respondent's Motion to Dismiss and assertions of error predicated on the Hearing Officer's denial of dismissal.

The nest series of issues raised by respondent center on the denial of pre-trial discover. In re Murray, supra, disposes of these issues. The requirements of due process do not require pre-trial discovery. Accordingly, we find no merit in respondent's assertions of error arising from the overruling of respondent's "Motion for Production, Inspection and Copying Documents and Things", the refusal of police officers to answer certain questions during pre-trial depositions, and the refusal of WASK News department reporters to answer questions during pre-trial depositions.

As a fifth general assertion of error, the respondent asserts that it was improper for the Hearing Officer to exclude testimony of news reporters by reason of the Indiana Shield Law (I.C. 34-3-5-1).

This assertion of error stems from an attempt by respondent to elicit testimony from news reporters called as witnesses by the respondent. Examination

of the transcript indicates that objection was made to such testimony as being immaterial and confidential under the shield law. The majority of objections were made when reporters were asked if certain matters were discussed with particular individuals. This type of conversation is protected by the shield law.

The transceipt further demonstrates that on several occasions WASK News reporters were questioned as to why their course of investigation changed from a news story to a disciplinary matter. We find these questions to be irrelevant to the issue before the Hearing Officer and this Court, to-wit: The substantiation of alleged violations of the Code of Professional Responsibility and the Code of Judicial Conduct and Ethics, as then in effect. Accordingly, we now find that the testimony from which this assertion of error emanates was properly excluded.

Respondent further asserts that he was denied his right to confront his accuser in that the party who filed the initial grievance, J. Michael Piggott, declined to testify under the Indiana Shield Law. Respondent confuses this proceeding with a criminal prosecution. The party signing a grievance is not parallel to the victim who signs a charging affidavit. Within the disciplinary process, the Disciplinary Commission is given the responsibility of making an independent judgment as to the likelihood of misconduct. It is the Disciplinary Commission and not the grievant who files the complaint.

The respondent also asserts that he was improperly denied an opportunity to demonstrate a waiver of the shield law by news reporters. This argument is misdirected. The record demonstrates that respondent sought to develop, through his interrogation of the news media witnesses, that a conspiracy, adverse to the respondent, existed among such individuals. These individuals were called by the respondent and did not testify against him; additionally, respondent does not argue that witnesses presenting evidence against him were involved in such conspiracy. Thus, as the case developed at the hearing level, respondent called witnesses, who had not testified, attempted to develop a conspiracy theory unrelated to adverse witnesses, and was prevented from doing so by the use of the shield law and the rulings of the Hearing Officer. We view the excluded testimony as irrelevant; likewise, whether or not there was a waiver of the shield law is irrelevant.

Several remaining issues may be grouped within the consideration of whether, as a matter of law, the failure of the respondent, a Judge in a City Court, to disqualify himself constitutes a basis for disciplinary action. The respondent argues that, in the cases giving rise to the present proceedings, there was no showing that disqualification was required. Thus, whether he disqualified himself or not was a discretionary matter and accordingly not a proper basis for a disciplinary proceeding. Alternatively, respondent points out that if he did not properly disqualify himself, the remedy came by

reason of a voidable judgment and not through a disciplinary proceeding.

The respondent has confused the function of a disciplinary proceeding and an appeal. Under the Constitution of this state, this Court must establish and maintain standards of conduct for attorneys and judges, most standards being based upon the propriety of the professional conduct involved. These standards exist independent of the results of litigation out of which may develop an allegation of impropriety. The fact that a judgment may or may not be voidable is not determinative of whether the acts of an attorney or judge constitute misconduct. The standard is the code and it is the particular conduct, not the outcome of the litigation, which determines whether or not there is a violation. At a later point in this opinion, the specific acts of the respondent will be set forth and measured against the applicable code provisions. Accordingly, this Court now finds these assertions of error to be without merit.

Next, respondent argues that he was improperly prohibited from introducing a taped conversation into the proceeding. This conversation allegedly took place between a police officer and one of the witnesses against the respondent. The police officer maintained possession of the tape and at a later point turned it over to the attorney for respondent. The respondent attempted to introduce this tape by playing it to the Disciplinary Commission's witness for identification.

This Court has previously held that the requirements set forth in Lamar v.

State (1972), 258 Ind. 504, 282 N.E.2d, 795, concerning the necessary foundation for the introduction of a taped recording, have general application in disciplinary proceedings. In re Wood (1976), _____ Ind. _____, 258 N.E.2d, 128. The first of these requirements is that a foundation must be laid demonstrating that the tape is authentic and correct. We find that the playing of the tape to a witness in open court is not a proper way to meet this requirement. Thus, we conclude that the tape was correctly excluded from the record.

The respondent also asserts that he was improperly precluded from showing that a political conspiracy existed to defeat him and bring discredit to his party. The record demonstrates, however, that this alleged conspiracy did not involve any witness to the proceeding. The respondent was allowed to demonstrate bias and prejudice of the witnesses who testified; he was only precluded from developing evidence of prejudice of those who had not adversely testified against him. This Court finds that this evidence was immaterial and properly excluded.

At the beginning of the proceedings before the Hearing Officer, the respondent requested and was granted a closed hearing. The record indicates that on several occasions the Hearing Officer admonished witnesses, in the presence of counsel, not to disclose their testimony to anyone outside of the hearing room. It appears readily clear to this Court that the Hearing Officer meant exactly that; the testimony was not to be disclosed to anyone, including other witnesses.

Later in the hearing, it was discovered that taped or transcribed portions of the hearing were being provided by the respondent to witnesses. After learning of such practice, the Hearing Officer suppressed the testimony of respondent's witnesses who had been furnished this prior testimony. Respondent now asserts that this suppression of testimony was improper.

The core of respondent's argument is that although this was a closed hearing, there was no formal separation of witnesses. Thus, respondent concludes that it was proper to provide the prior testimony to witnesses.

We find that respondent's argument elevates form over substance. The record does not indicate that a formal separation of witnesses was entered; however, the record is clear that the Hearing Officer, throughout the proceeding, considered this a private hearing which incorporated the protection of an order for separation. This view should have been readily apparent to counsel. Once a violation of the separation of witnesses is disclosed, a trial court has discretion as to whether or not to allow the witness to testify. Myslinski v. State (1971), 257 Ind. 453, 275 N.E.2d, 544; McCoy v. State(1960), 241 Ind. 104, 170 N.E.2d, 43. This Court now adopts the ruling of the Hearing Officer suppressing this testimony.

Respondent next asserts that the testimony of David Banton, who was called as a witness by the Disciplinary Commission, should be suppressed in that this witness was not available for cross-examination. During the trial the Disciplinary Commission attempted to show, through the introduction

of a hearsay document, that the respondent procured the absence of this witness. We find the Disciplinary Commission evidence insufficient to establish this point. Accordingly, in the interest of fairness, we have excluded the testimony of David Banton and the Disciplinary Commission's exhbiits purporting to connect the respondent to Mr. Banton's unavailability from any consideration of misconduct.

The remaining assertions of error concern the introduction of evidence, evidentiary rulings, the substantiation of alleged facts and conclusions to be drawn from the factual findings. Assertions of error along these lines need not be individually addressed. As this Court stated in the Murray Case, supra, ultimate findings of fact upon which a determination of misconduct is weighed are reached through a complete examination of all matters, including the transcript. In the present case, the process of review has included examination of the record and all matters submitted by the parties. The following portion of this opinion sets forth the factual findings and conclusions this Court has reached.

Under Count I of the complaint, the respondent is charged with violation of Disciplinary Rules 1-102(A)(5) and (6), 7-105, 9-101(A) and (C) of the Code of Professional Responsibility and Canon I of the Code of Judicial Conduct, as then in effect.

After examining all matters which have been submitted in this cause, this Court now finds that in August, 1972, the respondent, as attorney for Jacquelyn S. Mathes, commenced a cause of action for

divorce against Larry Mathes in the Tippecanoe Superior Court #2. This suit was concluded by a decree of divorce under which Mr. Mathes was to pay a sum of $35 per week for the support of the three minor children. Mr. Mathes, at that time, paid the respondent attorney's fees for the representations of Mrs. Mathes. In early 1974, the respondent commenced representation of Mrs. Mathes for the collection of delinquent child support. Along these lines, the respondent had several personal conferences with Mr. and Mrs. Mathes, eventually culminating in agreement on the amount of support arrearage.

In May, 1974, Mr. Mathes was found by the Tippecanoe Superior Court to be delinquent in his child support obligations in the sum of $175. Additionally, the Court ordered Mr. Mathes to pay the respondent reasonable attorney's fees in the sum of $75 for his representation of Mrs. Mathes in the contempt proceedings; $35 of this fee was paid to the respondent.

In August, 1974, Mrs. Mathes whose name was then Jacquelyn Sue Wright, executed an affidavit charging her former husband with the offense of having failed to provide support for the parties' minor children; this cause was then filed in the Lafayette City Court, where the respondent was the duly elected and qualified judge. Thereafter, the respondent entered an order directing Larry Mathes to be served the summons returnable on August 26, 1974. On August 22, 1974, Mrs. Mathes signed an application for contempt, which was filed in the Tippecanoe Superior Court on August 26, 1974, Larry Mathes appeared before the

respondent in the Lafayette City Court; he was not represented by counsel. No witnesses appeared on behalf of the State, respondent did not offer to disqualify himself, and respondent did not advise Mr. Mathes that he had a right to ask for a change of Judge. Respondent thereafter accepted a plea of guilty and withheld judgment for a period of two years on condition that Larry Mathes pay $45 weekly support for the benefit of the three minor children. Respondent further advised Mr. Mathes that if the $45 per week was not paid, the defendant would be subjecting himself to a fine of up to $500 and incarceration of up to six months. On September 9, 1974, the Superior Court found Mr. Mathes to be $60 in arrears, and again ordered that the respondent be paid $75 attorney's fees.

This Court finds that the conduct of respondent in this matter was prejudicial to the administration of justice, adversely reflected upon respondent's fitness to practice law, involved a threatened use of criminal proceedings to enforce civil obligations, involved private employment in areas where the judge had acted in a judicial capacity, and inferred that the respondent could improperly influence a judicial decision. Accordingly, this Court finds that the conduct of the respondent violated the provisions of the Code of Professional Responsibility set forth in Count I of the complaint. Also, the conduct of respondent in this matter was improprietous and accordingly violated Canon I in the Code of Judicial Conduct, as then in effect.

Under Count II of the Amended Complaint, the respondent is charged with violating

Disciplinary Rules 1-102(A)(5) and (6) of the Code of Professional Responsibility and Canon I of the Code of Judicial Conduct, as then in effect.

After examination of all matters which have been submitted in this cause, this Court now finds that in August, 1972, the respondent, as attorney for Vivian E. Hunter, commenced an action for support against Mrs. Hunter's husband, Kenneth Hunter, in the Tippecanoe Superior Court #2. This action was subsequently dismissed with Mr. Hunter paying $300 attorney's ffes; however, in May, 1973, the respondent filed a similar action for Mrs. Hunter, again in the Tippecanoe Superior Court. This proceeding concluded by a decree of divorce under which Kenneth Hunter was to pay $30 per week child support and an additional $300 attorney's fees. In May, 1974, Mrs. Hunter, with respondent appearing as counsel, filed an application for contempt citation against Mr. Hunter in the Tippecanoe Superior Court. This matter was concluded without hearing. In August, 1974, Mrs. Hunter executed an affidavit charging her former husband with the offense of failing to provide support, and this cause was filed in the Lafayette City Court where the respondent was the duly elected judge. On September 5, 1974, Mr. Hunter appeared before respondent and entered a plea of guilty. The respondent withheld judgment for a period of two years on condition that Mr. Hunter pay $30 per week for the minor children. Respondent advised Mr. Hunter that if he did not pay the support obligation, he, Mr. Hunter, would be going to jail.

This Court now finds that the acts

of respondent were prejudicial to the administration of justice, adversely reflected on respondent's fitness to practice law, and were highly improprietous for a judicial officer. Accordingly, the Court further finds that the respondent's conduct violated the provisions set forth under Count II of the Amended Complaint.

In Count IV of the Amended Complaint, respondent was charged with violating Disciplinary Rule 1-102(A)(5) and (6) and 9-101(C) of the Code of Professional Responsibility and Canon I of the Code of Judicial Conduct, as then in effect.

This Court finds that the respondent represented David S. Banton in criminal and civil matters. In 1973, four proceedings were commenced against David S. Banton in the Lafayette City Court. The respondent did not disqualify himself as judge of the Lafayette City Court in any of the cases. On June 16, 1974, David S. Banton was arrested by Lafayette police on charges of driving under the influence of alcohol, fleeing a police officer, and running a stop sign. At that time, normal police procedure required a person arrested for driving under the influence would remain in police custody for several hours. Mr. Banton made two phone calls when he arrived in the Police Station. Within five minutes respondent called Lafayette Police and directed that David Banton be released without bond on his own recognizance.

This Court now finds that the conduct of the respondent in this matter was prejudicial to the administration of justice, adversely reflected on respondent's fitness to practice law, suggested that the respondent could influence, improperly,

judicial decisions and involved improprietous acts for a judicial officer. Accordingly, this Court further finds that the conduct of the respondent constitutes a violation of the provisions cited in Count IV of the Amended Complaint.

Under Count V of the Amended Complaint, the respondent is charged with violating Disciplinary Rules 1-102(A)(5) and (6), 9-101(C) of the Code of Professional Responsibility, and Canon I of the Code of Judicial Conduct. This Court now finds that the respondent, as an attorney, represented Richard Dean Smith. In 1974, the respondent sat in Lafayette City Court on various cases involving Mr. Smith. The respondent did not disqualify himself in any of these matters.

The Court further finds that prior to these cases being filed, respondent had encouraged Richard Dean Smith and others to perpetrate first-degree burglary. This conduct indicates acts prejudicial to the administration of justice, adversely reflects on respondent's fitness to practice law, implies the improper ability to influence judicial decisions, and was highly impropietous for a judicial officer.

This Court now finds that the respondent violated the Code of Professional Responsibility and the Code of Judicial Conduct as charged under Count V of the Amended Complaint.

Under Count VI of the Amended Complaint, the respondent is charged with violating Disciplinary Rules 1-102(A)(3), (4) and (6). This Court now finds that on February 9, 1974, Richard Dean Smith and Paul Banton burglarized the residence of

William R. Osborn, removing, among other things, numerous hand guns and rifles. Prior to this burglary, the respondent had informed Smith and Banton of the existence of an expensive gun collection in the home of Mr. Osborn. After the burglary, the respondent purchased and received at least one hand gun and three rifles which had been stolen from the Osborn residence, knowing them to have been so stolen.

This Court now finds that the acts of respondent involved illegal conduct, constituted conduct involving dishonesty, and adversely reflected on respondent's fitness to practice law. Accordingly, the Court further finds that the respondent violated the Code of Professional Responsibility as charged under Count VI of the Amended Complaint.

Under Count VII of the Amended Complaint, the respondent is charged with violating Disciplinary Rules 1-102(A)(3), (4) and (6).

After esamining the matters which have been submitted in this cause, the Court now finds that on or about March 15, 1974, Richard Dean Smith and Paul Banton burglarized the home of Maurice E. Callahan, removing, among other things, miscellaneous coins. Prior to this burglary, the respondent had advised Mr. Smith and Mr. Banton that he was interested in obtaining these coins by illegal means.

This conduct involved illegal acts, involved dishonesty, and adversely reflects on the respondent's fitness to practice law. Accordingly, this Court now finds that the respondent has violated the Code of Professional Responsibility as charged under Count VII of the Amended Complaint.

It now becomes the duty of this Court to determine the appropriate discipline in this case. This Court has stated in previous cases that such decisions are reached by taking into consideration the nature of the violations, the specific acts of the respondent, this Court's responsibility to preserve the integrity of the bar, the risks, if any, to which we will subject the public by permitting the respondent to continue in the profession or be reinstated at some future date, and the deterrent effect that the imposition of discipline has on the bar in general. In re Murray, supra; In re Wood, supra; In re Noel (1976), _____ Ind. _____, 350 N.E. 2d, 623. It is obvious, from an examination of the findings of this Court, that respondent does not begin to measure up to acceptable standards of professional conduct. He has engaged in illegal, dishonest, and reprehensible activity. He has blurred the function of an attorney into his acts as a judicial officer. The respondent is a grave discredit to the legal profession.

With these considerations in mind, we now conclude that in order to preserve the integrity of the legal profession, in order to protect the public from future conduct demonstrated in this case, and in order to show this Court's total abhorrence in the conduct of the respondent, the maximum disciplinary sanction authorized by the Constitution of the State of Indiana must be imposed in this case. Accordingly, by reason of the misconduct found under the above specified counts of the Amended Complaint, it is now ordered that the respondent be, and he hereby is, disbarred

as an attorney in the State of Indiana.

Costs of these proceedings are assessed against the respondent.

App. B F. The Respondent was denied due process of law under each of the following particulars:

1. The hearing was not held within 60 days of the finding of reasonable cause by the Disciplinary Commission under Disciplinary Rules, and in fact the Hearing Officer was not appointed within such time.

2. The Hearing Officer stated on occasions during the hearing that he was not applying the strict rules of evidence when he permitted witnesses for the Disciplinary Commission to answer questions, but in refusing to permit Phyllis Wireman and Paul Banton to testify, he did so based upon supposed rules of evidence. At the time from the evidence the Hearing Officer knew that Paul Banton was a crucial witness for the Respondent, he being the one person Disciplinary Commission Witness Richarg Smith placed with all conversation supporting Counts VI and VII.

3. The Hearing Officer stated on occasions during the hearing that he was not applying the strict rules of evidence when he permitted witnesses for the Disciplinary Commission to answer questions, but in refusing to strike the evidence of David Banton, he did so based upon supposed rules of evidence.

4. The Hearing Officer on cross-examination refused to permit the Respondent to ask Disciplinary Commission witness, Richard Smith, whether particular state-

ments on Exhibit 12 were correct, but on redirect examination by the Disciplinary Commission, over objection by Respondent he permitted such questions to be asked and answered by Richard Smith.

5. The Hearing Officer refused to permit the Respondent to question witnesses on a conspiracy against Respondent between Michael Riley, a candidate for Mayor; Police Officers Eberle and Holmes; and J. Michael Piggott; or to examine into the reasons for J. Michael Piggott in filing the original complaint.

6. The Hearing Officer by determining that J. Michael Piggott was not the complaining witness, but that rather the Disciplinary Commission, denied Respondent the right to enforce his testifying under his oath on his original complaint.

7. The Hearing Officer, by withholding his ruling on Respondent's Motion to Strike the testimony of David Banton particularly prevented Respondent asking questions going to this testimony, since by so doing Respondent could be opening the door to matters that may not eventually be in evidence if the testimony was stricken.

8. The Hearing Officer was inconsistent in overruling and sustaining objections to questions concerning matters shown on Exhibits, on matters concerning Grand Jury testimony and on hearsay evidence.

Issue B-12, E-1 and F-2 concern the examination of the Respondent's wife, Phyllis Wireman. After asking her name, the Disciplinary Commission

moved that the Hearing Officer hear no further testimony on the grounds that Laura Shepard had testified that they had listened to the tape of Sgt. Holmes. He maintained this had violated the rule concerning separation of witnesses and the private nature of the hearing. (This occurred before March 10). The Hearing Officer sustained the motion of the Commission that she not be permitted to testify. An offer to prove was then made. (Tr. p. 1567-1568, q.1-6). This issue is based upon the Hearing Officer's error in this ruling. Issue No. E-1 maintains that this ruling is contrary to law, and Issue F-2 that this ruling denied the Respondent his constitutional right of due process of law.

Issue B-13 after Paul Banton, a witness for Respondent was asked his name and address, the Disciplinary Commission moved to supress any and all testimony of Mr. Banton because he had read the testimory of Richard Dean Smith. It was explained by Respondent that this had happened prior to the rule of the Court of March 10, and that the transcript was picked up from Mr. Banton the following day, Thursday, March 11. The Hearing Officer sustained the Disciplinary Commission's motion, and an offer to prove was made. (Tr. p. 1628-1635). It is again submitted that this was an improper ruling by the Hearing Officer.

Issue F-2 contends that this ruling violated Respondent's constitutional right of due process of law.

It is first submitted that, under the circumstances herein, the ruling of the Court was an abuse of discretion, and was a violation of Respondent's constitutional right under the Sixth Amendment of the Constitution to be confronted by witnesses, and his right to compulsory process under the Sixth Amendment and a denial of due process of law.

Supreme Court, U. S.
FILED
APR 18 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

(OCTOBER TERM 1977)

NO. 77-1267

LEWIS T. WIREMAN

Petitioner

vs.

INDIANA SUPREME

COURT DISCIPLINARY COMMISSION

Respondent

ON PETITION FOR

WRIT OF CERTIORARI

BRIEF FOR RESPONDENT IN OPPOSITION

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Indiana Supreme Court
Disciplinary Commission

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. ~~A-590~~ 77-1267

LEWIS T. WIREMAN

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INDIANA SUPREME COURT
DISCIPLINARY COMMISSION

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT IN OPPOSITION

I.

Opinion Below

The Petitioner's summary of the opinion below is correct. The opinion below was rendered October 14, 1977.

II.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

III.

Questions Presented

The Petitioner wholly fails to argue, and has, therefore, waived, his questions (1)(a), (b), (c), (d), (g), (i), (2)(a), (c), (3)(c), (4), and (7). The balance of the questions presented are responded to below in Respondent's argument.

IV.

Constitutions, Statutes, And Rules Involved

The Petitioner has fairly summarized those provisions of the various constitutions, statutes and rules he claims have application to the questions presented.

V.

Concise Statement Of The Case

The Respondent is disappointed with the Petitioner's statement of the case. The state-

ment does not accord with Supreme Court Rule 23(e). It contains, in the main, matter that is argumentative and self-serving.

VI.

Argument

The Respondent first asserts that he was denied due process of law when the direct testimony of Commission witness David Banton was not stricken by the Hearing Officer when Banton became unavailable for cross-examination.

The Petitioner has not and cannot demonstrate that he was affected injuriously by the ruling of the Hearing Officer. The Supreme Court of Indiana, in considering this issue, determined as follows:

> "(I)n the interest of fairness, we have excluded the testimony of David Banton and the Disciplinary Commission's exhibits purporting to connect the respondent to Mr. Banton's unavailability from the consideration of misconduct."
> (Petitioner's Brief, Exhibit A, p. 54)

In view of the decision of the Indiana Supreme Court to not consider the direct examination of

the subject witness, the Respondent's inability to cross-examine such witness was harmless.

The Petitioner next asserts that he impermissably was prevented from presenting testimony of his witness Ronald Cox as to the behavior of a Commission witness while in prison. The Petitioner has failed to demonstrate how and when the federal question sought to be reviewed was raised below and the ruling of the court below thereon. The Petitioner has waived this alleged ground for review.

The Petitioner's third ground for relief in his claim that he was denied due process of law when the testimony of two (2) of his witnesses was circumscribed by order of the Hearing Officer on account of a wilfull violation by Petitioner of the rule regarding separation of witnesses.

The record below amply demonstrates that the subject disciplinary hearing was conducted as a private, closed hearing in which the various witnesses were admonished to not reveal their

testimony to others. (Tr. pp. 2, 119, 147, 148, 160, 207, 217, 218, 219, 220, 221, 240, 280, 281, 339, 364, 410).

During the Petitioner's case, he called his wife Phyllis as a witness. The Commission moved the Hearing Officer not to permit Mrs. Wireman to testify on the ground that it had been conclusively shown that Mrs. Wireman listened to tape recordings made by the Petitioner of portions of the testimony of witnesses who earlier had testified in the disciplinary proceeding. Thereupon, the Hearing Officer asked the Petitioner whether this was true and Petitioner's counsel replied that it was. Accordingly, Mrs. Wireman was prohibited from testifying to any matter which had been discussed and recorded during the proceeding in the hearing room.

Another witness called by the Petitioner during his case was one Paul Banton. At the outset of Mr. Banton's testimony, counsel for the Commission established through preliminary

examination that before being called to testify he had been given by Petitioner's attorney, and had read, a transcript of Commission witness Richard Dean Smith's testimony. With this preliminary showing having been made, the Hearing Officer announced that this act was "reprehensible" and he prohibited the witness from testifying further.

The Hearing Officer clearly had the right to prohibit those witnesses from testifying who, at the instance of the Petitioner and his counsel, had violated the secrecy of the hearing and the order for separation of witnesses. Such a ruling by the Hearing Officer was clearly within his discretion. Numerous federal cases hold that trial judges do have discretion to prohibit witnesses to testify who have violated a separation order, if the violation of the order was "with the consent, connivance, procurement or knowledge of the defendant or his counsel". See, for example, United States v. Schaefer (1962), 299 F.2d 625 and United States v. Kiliyan (1972), 456 F.2d 555.

The Petitioner asserts next that he was denied the opportunity to demonstrate that the disciplinary charges were the result of a political conspiracy. The Indiana Supreme Court correctly answered this contention when it held as follows:

> "(T)his alleged conspiracy did not involve any witness to the proceeding. The respondent was allowed to demonstrate bias and prejudice of the witnesses who testified; he was only precluded from developing evidence of prejudice of those who had not adversely testified against him. This Court finds that this evidence was immaterial and properly excluded." (Petitioner's Brief, Exhibit A, p. 52)

Petitioner's fifth assertion is that the evidence introduced against him did not support certain of the violations of the Code of Professional Responsibility for Attorneys at Law for which he was disciplined. Specifically, he says that his conduct as judge was not in violation of such Code. The Indiana Supreme Court considered and properly rejected this erroneous contention. See Petitioner's Brief, Appendix A, pp. 51, 54-59.

Apparently, the Petitioner argues that the Respondent did not adhere properly to the Rules of the Indiana Supreme Court in processing the subject grievance. He cites no authority and does not show, or attempt to explain, how he allegedly was prejudiced thereby.

The Petitioner makes the bald assertion that the Indiana Supreme Court lacked jurisdiction to discipline the Petitioner because of Petitioner's underlying criminal conduct. This assertion was not made below and cannot be advanced for the first time before this Court. See Petitioner's Brief, Appendix A and B.

Conclusion

The decision below is clearly correct. For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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